Supreme Court, U.S.
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No. 94-204

In the Supreme Court of the United States

OCTOBER TERM, 1994

JIMMY C. CHISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The petition in this case was not timely filed and the Court therefore lacks jurisdiction.

1. The first opinion of the court of appeals (Pet. App. A5-A7) was filed on September 13, 1993. That opinion affirmed the judgment of the district court dismissing petitioner's claim, on the ground that petitioner's suit was barred by the statute of limitations (*id.* at A6-A7). Petitioner thereafter filed a petition for rehearing. On January 24, 1994, the court of appeals denied the petition but withdrew the September 13, 1993, opinion and entered a new opinion, affirming the district court's decision on the merits rather than on the statute of limitations (*id.* at A1-A3, A17; see *id.* at A3 n.1). The opinion on rehearing did not vacate the earlier judgment of the court

of appeals affirming the district court. That judgment remained in effect (*id.* at A3, A7).

Petitioner filed a second petition for rehearing with suggestion for rehearing en banc on February 7, 1994. Petitioner contended in that petition that the court's January 24, 1994, decision on the merits was in error. That petition was denied by the court of appeals on May 11, 1994 (Pet. App. A19). The petition for a writ of certiorari was filed on August 1, 1994, invoking this Court's jurisdiction under 28 U.S.C. 1254(1). The petition for a writ of certiorari was filed more than 90 days after the denial of the first petition for rehearing and less than 90 days after the denial of the second petition for rehearing.

2. This Court noted in *Missouri* v. *Jenkins*, 495 U.S. 33, 45-46 (1990), that:

> Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. * * * Unless the * * * petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.
>
> Since *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264 (1942), it has been the consistent practice of the Court to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing. * * * [W]hile the petition for rehearing is pending, there is no "judgment" to be reviewed.

See also Sup. Ct. R. 13.4.

In the present case, although the court of appeals revised its opinion in response to the first motion for rehearing, it did not alter its initial judgment in any fashion (Pet. App. A3, A7).[1] This Court has often noted that its "power is to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)). See also *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Accordingly, the "mere fact that a judgment previously entered is reentered or [is] revised in an immaterial way does not toll the time within which review must be sought." *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984), quoting *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

Under Rule 40(a) of the Federal Rules of Appellate Procedure, "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." The second rehearing petition in this case was not filed in compliance with this Rule; there is accordingly no basis for contending that the second rehearing petition further extended the time for filing a petition for a writ of certiorari. Because petitioner failed to file the petition for a writ of certiorari within 90 days of the denial of the first rehearing petition, the petition for a writ of certiorari is untimely and the Court therefore lacks jurisdiction.[2]

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[1] The court also did not revise or amend its judgment in response to petitioner's second petition for rehearing.

[2] Because the petition is untimely and the Court therefore lacks jurisdiction, we have not responded to the petition on the merits. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994